IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 878 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

THAKORE POPAJI KADVAJI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 878 of 2003

MR DEEPAK M SHAH for Petitioner No. 1

MR ND GOHIL,APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE A.L.DAVE

Date of decision: 24/12/2003

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE KSHITIJ R.VYAS)

1. The appellant has filed this appeal through jail whereby he has challenged the judgment and order dated 15.5.2003 passed by the learned Addl. Sessions Judge, Fast Track Court, Mehsana in Sessions Case No.243 of 2002. By the said judgment, the appellant is convicted of the offence punishable under section 376 of IPC and is sentenced to suffer R.I. for ten years and to pay a fine of Rs.1000/-, in default, to undergo further R.I. for one year. The appellant is also convicted of the offence punishable under section 506 IPC and is sentenced to suffer R.I. for six months and to pay a fine of Rs.200/-, in default, to undergo further R.I. for one month.

2. We admitted this appeal on 5.12.2003 and on the same day, issued notice to the State for the purpose of considering the question of bail.

3. After hearing Mr. D.M.Shah, learned Appointed Advocate for the appellant and Mr.N.D.Gohil, learned APP, with their consent, we have decided to hear the entire appeal finally. This is particularly in view of the fact that a question of involvement of the appellant and adequacy of sentence can be decided on the sole testimony of prosecutrix and other circumstances. We have gone through R.& P. of the case.

4. The facts giving rise to the present appeal can briefly be summarised as under:

On 10.5.2002, Amaji Bhikhaji Thakore, the father of the prosecutrix Kailash, filed a complaint before Dy. Superintendent of Police involving the appellant for the alleged rape committed on the prosecutrix before about five months. The Dy. Superintendent of Police forwarded the said complaint to PSI Langhanaj with an endorsement to initiate legal proceedings after registering offence. Accordingly, the offence was registered. The complainant has alleged that before about a month, when his eldest daughter Kailash was taken to the Government Hospital, Gozaria for the purpose of treatment of abdominal pain, the doctor informed that she was having pregnancy of four months. On making inquiry, Kailash informed that when her uncle was admitted in Mehsana Hospital before about four months, when nobody was there in the house, the appellant had come to their house and inquired from her as to where her parents were and on getting a reply that nobody was there in the house, he entered the house and committed rape on her against her wish. She was

threatened not to inform her parents and, therefore, she did not inform about the said incident to them. It is further stated in the complaint that the prosecutrix was thereafter admitted in Civil Hospital, Gozaria and abortion was carried out and because of threat, complaint was not filed. However, as the appellant was harassing Kailash, the complaint was filed.

5. After carrying out usual investigation, chargesheet was filed against the appellant in the Court of learned Chief Judicial Magistrate, Mehsana who in turn committed the case to the Court of Sessions.

6. The charge Ex.1 was framed against the appellant who pleaded not guilty to the charge and claimed to be tried. In his further statement, he has come out with a case of total denial of the prosecution case.

7. The learned Judge, after appreciating the evidence on record, convicted the appellant for the offence for which he was charged and imposed sentence as stated above.

8. Mr. DM Shah, learned Appointed Advocate for the appellant submitted that the complaint in the instant case is filed after about five months and no explanation is forthcoming for the delay in filing complaint. He further submitted that from the evidence of the prosecutrix, it is a clear case of consent and, therefore, no conviction can be based even if involvement of the appellant in the offence in question is established.

The learned APP Mr. Gohil, on the other hand, has supported the judgment of the trial court in toto.

9. Kailash, the prosecutrix who is examined at Ex. 21, in her evidence, has stated that on the day of the incident, her parents had gone to Mehsana to attend to her ailing uncle, her brother had gone to the school and her sister had also gone out;at that time, the appellant had come. After knowing from her that nobody was there in the house, he entered the house and pressed her mouth and made her to lie down. Thereafter, he committed sexual intercourse on her against her wish. Two to three months thereafter, she started getting pain in the abdomen and, therefore, she was taken to Gozaria Government Hospital where curative operation was performed. She also deposed that after about a month, the appellant came to her house and thereafter again committed rape on her on two to three occasions at an

interval of two to three days. In the cross examination, she has admitted that she did not shout for help because her mouth was pressed by the appellant. She admitted that she neither bite nor caused any nail injury to the appellant nor they torned the clothes of each other. According to her, she did not shout when the accused committed rape on her subsequently by an interval of two to three days. She also admitted that she did not inform either her parents or her friends.

10. On going through the evidence of the prosecutrix, it appears that even though the appellant committed sexual intercourse against the will of prosecutrix, she did not inform about the same to anybody. It is only after two to three months when she was required to undergo curative operation, her parents came to know about the fact that the prosecutrix was subjected to rape.

11. The father of the prosecutrix Amaji Bhikhaji, though stated in the complaint that because of threat given by the appellant, police was not informed immediately after he came to know about the incident, however, on going through the entire evidence of the complainant, we do not find the said explanation. The complainant has failed to give any explanation whatsoever for waiting more than four months. No explanation is forthcoming as to whether he had made any attempts to approach police. Even no explanation is forthcoming about the incident having been disclosed to either relatives or to police. From the evidence of the complainant, it appears that the complainant had straight away approached Dy. Superintendent of Police, Mehsana with an application written by a lawyer. PSI Langhanaj initiated proceedings as per the endorsement made in the complaint by Dy. Superintendent of Police to the effect "to register the offence and to proceed in accordance with law".

12. In view of the aforesaid state of affairs, we do feel that the prosecution, in the instant case, has failed to establish charge against the appellant beyond reasonable doubt. In our opinion, it is too risky to base conviction relying upon the evidence of prosecutrix especially when she has divulged the offence after four months. Even though she was subjected to rape against her will, surprisingly she did not divulge the said fact to anybody which is against human conduct. The explanation given by her that because of threat given by accused, she did not inform relatives is totally unacceptable to us. It would not be out of place to

mention here that even though she has stated her age to be 15 years, the medical evidence suggests that she was 19 years of age at the time of incident. Therefore, the evidence of the prosecutrix,in our opinion, is not trustworthy and reliable and, therefore, does not inspire confidence.

13. In view of the above, we allow this appeal and set aside the judgment and order of conviction and sentence dated 15.5.2003 passed in Sessions Case No. 243 of 2002 by the learned Addl. Sessions Judge, Fast Track Court, Mehsana. The appellant to be set at liberty forthwith if not required in any other offence."

(Kshitij R.Vyas,J.)

(A.L.Dave,J.)
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